

Due to being convicted of a crime and placed in jail, the claimant was a no-call, no-show for his job with the employer. He is ineligible for benefits under G.L. c. 151A, § 25(e) because he caused his own unemployment.

**Board of Review
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Issue ID: 0022 7708 77

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from his position with the employer on November 15, 2016. He filed a claim for unemployment benefits with the DUA, effective August 20, 2017, which was denied in a determination issued on September 16, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 9, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, and, thus, he was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion, which is that the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2), due to mitigating circumstances, is supported by substantial and credible evidence and is free from error of law, where the reason for his failure to appear for work was due to being incarcerated following conviction of a crime.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked full time as a warehouse clerk for the employer, a staffing agency, from June, 2016, until November 15, 2016.
2. The claimant worked for the employer's client company.
3. The claimant's supervisor at the client company was the Warehouse Supervisor (the Warehouse Supervisor).
4. The claimant's supervisor at the employer was the Sales Manager (the Sales Manager).
5. The employer's client determined if an employee would be removed from assignment.
6. The claimant worked Monday through Friday, from 4 p.m. to 1 a.m.
7. On March 10, 2016, the claimant was arrested for suspicion of malicious destruction.
8. The claimant did not accept a plea deal offered to him and chose to go to trial for the arrest because he believed he was not guilty.
9. On November 3, 2016, the claimant was schedule to appear in court for trial.
10. On November 3, 2016, the claimant attended court and the trial was continued to the next day.
11. On November 3, 2016, the claimant went to work for the employer's client [after] court. The claimant did not notify the Sales Manager he had been to court that day or that he had court the next day because he believed he would not be convicted and he would be able to work the next day.
12. On November 4, 2016, the claimant attended court and was convicted of malicious destruction. He was sentenced to two and [a] half (2.5) years in jail.
13. At the time of the claimant's sentencing, he asked his attorney to notify his family of his sentencing because they were unable to attend his trial.
14. On November 4, 2016, the claimant was taken to the [Town A] House of Corrections to begin his sentence.
15. The claimant was unable to contact the employer from jail to tell them he would be absent because he did not have money to put toward his phone privilege.
16. On an unknown date, the claimant had money on his account and made a five (5) minute phone call to his sister. During the phone call, he asked his sister

to notify friends he worked with at the client that he was sentenced to two and a half (2.5) years. His sister agreed to contact his coworkers and tell them he was incarcerated.

17. It was unknown if the claimant's sister notified the claimant's friends of his incarceration.
18. From November 4, 2016, until July 21, 2017, the claimant remained in jail because he was sentenced to two and a half (2.5) years at trial. The claimant was unable to contact the employer from jail to tell them he would be absent from November 4, 2016 until July 21, 2017.
19. On unknown dates between November 4, [2016], and November 15, 2016, the Sales Manager sent the claimant text messages and called the claimant to ask about his whereabouts because they had not received payroll hours from him. The claimant did not respond to the employer's attempted contacts because he was in jail.
20. On or about November 15, 2016, the client company called the Sales Manager and told her they did not want the claimant back at that assignment because he had been a no call, no show since November 4, 2016.
21. On November 15, 2016, the claimant was discharged when the client company ended the claimant's assignment because he was a no call, no show since November 4, 2016.
22. On an unknown date, the claimant appealed the trial judge's decision.
23. On July 21, 2017, the claimant was released from jail while his appeal was pending.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

At issue in this case is whether the claimant is entitled to benefits pursuant to G.L. c. 151A, § 25(e), which provides, in relevant part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable

to the employing unit or its agent, (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence, or (3) because of conviction of a felony or misdemeanor.

The review examiner decided this case under G.L. c. 151A, § 25(e)(2), concluding that the claimant's failure to contact the employer about his absence was not in wilful disregard of the employer's interest, but due to the mitigating circumstance that he was in jail and did not have money to make the phone call. *See* Finding of Fact # 15. This was an error of law.

The employer fired the claimant for the misconduct of being a no-call, no-show. *See* Finding of Fact # 21. He was a no-call, no-show because, following his trial on November 4, 2016, he was convicted of a crime and immediately sentenced to jail. *See* Findings of Fact ## 12 and 14. On appeal, the employer argued that the claimant should be disqualified under G.L. c. 151A, § 25(e)(3). We agree. He separated due to being convicted of a felony or misdemeanor. However, because the DUA Notice of Hearing did not inform the parties to prepare evidence pertaining to G.L. c. 151A, § 25(e)(3),¹ we decline to decide this appeal on that ground.

Alternatively, we consider whether the claimant is eligible under another provision within G.L. c. 151A, § 25(e). The Supreme Judicial Court has upheld this Board's longstanding conclusion that termination of employment which resulted from an employee's failure to notify an employer of his reason for absence is tantamount to a voluntary resignation under G.L. c. 151A, § 25(e)(1). *See Olechnicky v. Dir. of Division of Employment Security*, 325 Mass. 660, 661 (1950), (claimant discharged after being absent for two days without notifying the employer).

The purpose of the unemployment statute is to provide temporary relief to "persons who are out of work and unable to secure work through no fault of their own." *Cusack v. Dir. of Division of Employment Security*, 376 Mass. 96, 98 (1978) (citations omitted). In another case, the Supreme Judicial Court denied benefits, pursuant to G.L. c. 151A, § 25(e)(1), to a claimant whose conviction for driving while intoxicated caused him to lose his license and his ability to get to work. *Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002 (1985) (rescript opinion). The Court stated, "[b]ecause Olmeda brought his unemployment on himself, he left work 'voluntarily,' and he is not entitled to unemployment benefits. *Id.* at 1002, *citing Rivard v. Dir. of Division of Employment Security*, 387 Mass. 528, 528–529 (1982) (person who causes the statutory impediment that bars employment leaves his job voluntarily within the meaning of G.L. c. 151A, § 25(e)(1)).

In attributing the claimant's failure to contact the employer to mitigating circumstances,² the review examiner ignores the fact that it was his criminal conviction that placed the claimant in jail to begin with. A criminal conviction is a judgment of guilt for the underlying offense. *See Wardell v. Dir. of Division of Employment Security*, 397 Mass. 433, 436 (1986). In short, the

¹ *See* Exhibit # 6, the Notices of Hearing sent to the parties.

² Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987).

claimant committed a crime, causing his own incarceration and inability to report for work or notify the employer of his absence. He brought his unemployment on himself.

We, therefore, conclude as a matter of law that the claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning August 20, 2017, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 21, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

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